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Supreme Court, U.S.
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No. 02-737

IN THE

Supreme Court of the United States

HAROLD E. STEELE, DON PETERSON,
REV. DAVID MAYNARD, HARMON WRAY,
AND REV. TOM BAKER, JR.,
Petitioners,

v.

INDUSTRIAL DEVELOPMENT BOARD OF
METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
DAVID LIPSCOMB UNIVERSITY,
NATIONSBANK AND NATIONSBANK/TENNESSEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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PRELIMINARY STATEMENT

Ordinarily, counsel would not file a Reply Brief. However, the Brief in Opposition filed on behalf of David Lipscomb University ("Lipscomb") contains a number of statements which require a response. The purpose of this Reply Brief is to direct the Court to certain arguments made by Lipscomb in order to set the record straight. Petitioners are hopeful that this Reply Brief will be filed with the Court in time for it to be considered with the other briefs at the time the Court determines whether to grant the Petition for a Writ of Certiorari in this case. Petitioners submit that considerations of fundamental fairness require that the Court consider Petitioner's reply to various statements contained in the Brief in Opposition filed on behalf of Lipscomb.

LIPSCOMB'S STATEMENT OF THE FACTS

The majority of the facts stated in the Brief in Opposition, pp. 1-12 are not supported by any citation to the record and, in fact, are outside the record. Moreover, many of these "facts" relate to Lipscomb's perception of itself today and not at the relevant time when the subject revenue bonds were issued more than ten (10) years ago. See Habel v. Industrial Dev. Auth., 400 S.E.2d 516 (Va. 1991).

In regard to the facts, the controlling consideration is that in resolving the cross-motions for summary judgment, the trial court determined that based on the undisputed facts, Lipscomb was so pervasively sectarian that the tax exempt bond issue had the primary effect of promoting religion. App. B. 115a-129a. The pervasively sectarian status of Lipscomb is a finding of fact which was not disturbed by the Court of Appeals. This Court has traditionally been reluctant to disturb findings of fact in which the two lower courts have concurred. Rogers v. Lodge, 458 U.S. 613, 625 (1982).

Since there has been no argument presented that the trial court's findings of fact are clearly erroneous, for purposes of this appeal, Lipscomb must be deemed to be a "pervasively sectarian" institution.

REPLY TO LIPSCOMB'S ARGUMENT FOR DENYING THE WRIT

1. Lipscomb argues that the majority opinion of the Court of Appeals does not conflict with Tilton v. Richardson, 403 U.S. 672 (1971), Hunt v. McNair, 413 U.S. 734 (1973), or Roemer v. Board of Public Works, 426 U.S. 736 (1976). Br. in Opp. 19. Petitioners disagree.

Lipscomb argues that in Hunt, "the relevant point is that this Court strongly indicated that such a program (revenue bond financing) presents no constitutional concern even when the recipient is a pervasively sectarian institution." Br. in Opp. 19. In support of this statement, Lipscomb quotes only a portion of footnote 7 of the Hunt opinion without indicating that it was not quoting the entire footnote.

The entire footnote 7 of the Hunt opinion follows with the portion omitted by Lipscomb underlined:

> "7. The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State of expenditure made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds

> or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton v. Kervick*, 56 N.J. 523, 530-531, 267 A2d 503, 506-507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S.C., at 107, 187 S.E.2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, Brief for Appellee 14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), where this Court upheld a local property tax exemption which included religious institutions."
>
> 413 U.S. at 745, n. 7.

The reason why the Hunt court concluded the revenue bonds did not advance or inhibit religion is that it had been determined that the beneficiary of the revenue bond funding, the Baptist College at Charleston, was not a pervasively

sectarian institution. 413 U.S. at 743-744. However, the Hunt court, in its opinion, noted that "[A]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 743.

In cases since Hunt, this Court has implicitly recognized the bond issue loan structure in that case as an example of direct state aid. See Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 842 (1995) (citing Hunt as one of the cases correctly cited by the Court of Appeals as establishing "the principle that we have recognized special Establishment Clause dangers when the government makes direct money payments to sectarian institutions") see also Mitchell v. Helms, 530 U.S. 793, 818 (2000) (plurality opinion) (citing Rosenberger); Id. 530 U.S. at 841-844 (citing Rosenberger for the proposition that "[T]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.") (O'Connor, J., concurring in judgment).

Petitioners respectfully submit that this Court has recognized special Establishment Clause dangers arise when the government makes direct money payments to a sectarian institution such as Lipscomb. As the trial court held in this matter, the Loan Agreement was between the government and Lipscomb. App. B., 138a. The money went directly to Lipscomb in the form of a loan from the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County (the "Board"). Id. The decision to loan the money by the government to Lipscomb

was not ministerial. As the trial court noted, in order to approve the bond issue for tax exemption, the Board had to find that the bond issue served a legitimate public purpose and/or created a substantial public benefit. App. B., 97a. This is simply not a ministerial function as claimed by Lipscomb, but instead involves the exercise of discretion by the government.

Petitioners submit that a Writ should be granted in this case because the majority opinion rendered by the Court of Appeals specifically held that the sectarian nature of Lipscomb is not a relevant consideration in this case. This holding appears to conflict with the Court's previous recognition that special Establishment Clause dangers arise when the government makes direct money payments to sectarian institutions.

This Court has noted that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997). The issue of whether the pervasively sectarian test should be overruled should be decided by this Court, not by a sharply divided panel of the United States Court of Appeals for the Sixth Circuit.

2. Lipscomb argues that "... it is undisputed that every court to consider the question has 'found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools,'" citing the majority Court of Appeals opinion, App. A, 11a, n. 4. Br. in Opp. 18. Petitioners respectfully disagree.

Of the cases cited by the majority Court of Appeals opinion at footnote 4, two of those cases did not apply federal constitutional law, but, rather, involve state constitutional law issues. Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202, 203-204 (1972) app. dism'd for want of sub'l fed'l question. 413 U.S. 902 (1973); and Washington Higher Educ. Facilities Auth. v. Gardner, 103 Wash.2d 838, 699 P.2d. 1240, 1243, 1245-46 (1985). In fact, the Durham case did not even involve tax exempt revenue bond funding, but, rather, a statute authorizing a state agency to guarantee loans at any institution of higher learning.

This is an "as applied" challenge case. Six of the cases cited in the majority Court of Appeals opinion at footnote 4 involve "facial" challenges to the constitutionality of enabling statutes and did not involve a "pervasively sectarian institution" as a beneficiary of the tax exempt bond issue. Nohrr v. Brevard County Educ. Facilities Auth., 247 So.2d 304, 307-309 (Fla. 1971); Cecrle v. Ill. Educ. Facilities Auth., 52 Ill.2d 312, 288 N.E.2d 399, 401 (1972); Opinion of the Justices, 354 Mass. 779, 236 N.E.2d 523, 526-527 (1968); Minn. Higher Educ. Facilities Auth. v. Hawk, 305 Minn. 97, 232 N.W.2d 106, 111 (1975); Vermont Educ. Bldg. Financing Agency v. Mann, 127 Vt. 262, 247 A.2d 68, 72 (1968), app. dismissed, 396 U.S. 801 (1969); and Washington Higher Educ. Auth. v. Gardner, supra.

Of the cases cited in the majority opinion of the Court of Appeals at footnote 4, two cases acknowledge that if tax exempt revenue bond funding was provided to a pervasively sectarian institution, it would probably violate the Establishment Clause. Cortez v. Independence County, 287 Ark. 279, 698 S.W.2d 291, 293-294 (1985); and California Educ. Facilities Auth. v. Priest, 12 Cal.3d 593, 116 Cal. Rptr. 361, 526 P.2d 513, 519, n. 8 (1974).

There is one case in footnote 4, Virginia College Bldg. Auth. v. Lynn, 260 Va. 608, 538 S.W.2d 682 (Va. 2000), which involves an "as applied" challenge to tax free revenue bond financing to a pervasively sectarian institution and which finds that such funding withstands an Establishment Clause challenge.

There is one case that involves tax exempt revenue bond financing, which is not cited in footnote 4 of the majority Court of Appeals opinion, which holds that if such aid is provided to a pervasively sectarian institution, it violates the Establishment Clause, Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11, 21 (1971).

Lipscomb argues that the Fourth Circuit has held that the Establishment Clause is not violated by a state aid program that utilizes similarly neutral criteria and that includes safeguards against the diversion of funds, even when the aid is provided to a pervasively sectarian institution, citing Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001). Br. in Opp. 19. However, in that case while the Court of Appeals declined to apply a pervasively sectarian analysis, the fact remains that the trial court had determined that Columbia Union College was not a pervasively sectarian institution. 254 F.3d at 508.

Contrary to Lipscomb's assertions, there is not a "uniform line of lower court authority... [that] belies, petitioners' claim that the Sixth Circuit's decision conflicts with this Court's precedents." Br. in Opp. 18.

3. Lipscomb quotes footnote 7 from Hunt v. McNair, supra at 746 for the proposition that tax exempt revenue bonds for a pervasively sectarian institution would not constitute "direct aid" in violation of the Establishment

Clause. Br. in Opp. 19-20. As has been pointed out in this brief at p. 2, Lipscomb did not quote footnote 7 in its entirety in its brief. Br. in Opp. 20. The portion of footnote 7 conveniently omitted by Lipscomb clearly shows that footnote 7 does not support the proposition for which Lipscomb is citing it. Infra., p. 2.

Moreover, the case citations in footnote 7 of the Hunt decision, which Lipscomb omitted from its brief, Br. in Opp. 20, do not support Lipscomb's argument. In Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11, 21 (1971), which was remanded to the New Jersey Supreme Court after Hunt was decided, the Court upheld the validity of the statute authorizing tax exempt revenue bond financing, but also held that "no college may participate if it restricts entry on... religious grounds or requires all students gaining admission to receive instruction on the tenets of a particular faith." 285 A.2d at 27. In other words, revenue bond financing extended to a pervasively sectarian institution is direct aid in violation of the Establishment Clause. Based on the trial court's findings of fact concerning Lipscomb, App. A, 117a-129a, the Clayton court would determine, just as the trial court did, that the tax free revenue bond funding granted by the government to Lipscomb violated the Establishment Clause.

As has been previously pointed out in this brief, this Court has recognized that there are Establishment Clause dangers when the government makes direct money payments to sectarian institutions. Rosenberger v. Rector and Visitors of the University of Virginia, supra at 842; Mitchell v. Helms, supra at 841-844 (O'Connor, J., concurring in judgment). The trial court determined that "it is clear that a direct benefit is precisely what Lipscomb received. The government chose to provide Lipscomb with low interest financing through a Loan Agreement. The government

obtained the funding for the loan by issuing tax exempt revenue bonds and assigned the loan to Sovran Bank, but the loan still came from the Board, and hence, from Metro (the government)." App. A, 138-139a.

Lipscomb argues that the Tennessee statute is facially neutral. However, the trial court noted that because of a "lack of evidence, the Court cannot find, as a matter of law, that the decision to provide financial assistance was made on a neutral basis." App. A, 146a. Lipscomb and the Metropolitan Government of Nashville and Davidson County failed to present evidence that the Board was neutral when it made its decision to issue bonds for the benefit of Lipscomb.

Finally, a key factor in determining whether the aid to Lipscomb had the impermissible effect of advancing religion is whether the aid was given to the religious institution at the discretion of the government or as a result of independent choices of private individuals. See Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). Where government funds are provided to individuals who then decide to use those funds in support of religious education, the Court has found that there is no government support of religion. See Zobrest, supra at 8-10.

The trial court determined that in the case at bar, it was the Board, not private investors, who decided who would receive the benefit of the sale of the bonds. The private investors could not select which institution they wanted to receive the funds. They merely chose to invest in tax free bonds. App. A., 147a. The government chose to provide Lipscomb with low interest financing through a Loan Agreement. The government obtained funding for the loan by issuing tax exempt bonds and assigned the loan to

Sovran Bank. Nevertheless, the loan was from the government to Lipscomb. App. A, 139a. In short, the government, and not private individuals, decided to confer this direct benefit to Lipscomb, a pervasively sectarian institution.

CONCLUSION

Contrary to Lipscomb's arguments, this case presents a serious Establishment Clause issue which should be decided by this Court.

Respectfully submitted,

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